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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

CENTENNIAL, A UTAH CORPORATION, JOHN A. DAHLSTROM AND ARNOLD C. WOOD, *Petitioners*,

v.

PLACER U.S., INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITIONERS' REPLY BRIEF

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REPLY STATEMENT OF REASONS FOR GRANTING CENTENNIAL'S PETITION

I. The Factual Summary Contained in Respondent's Brief in Opposition is Inaccurate and Has Been Used Throughout the Proceedings as a Smoke Screen to Hide Real Defects in Placer's Title.

Throughout the proceedings in this case Respondent has continually referred to the disputed mining claims as if they were Fee Simple ownership in land where all questions of ownership had been resolved. This is simply not a fact. The paramount title to the surface and mineral rights involved in this case is held by the United States government. The competing claims of Petitioners were not the only clouds on these claims. This fact is indicated by the pleadings, which name 21 other defendants, and the trial court's ruling which devotes 21 pages to boundary line agreements. (B-26 through B-27; Exhibit A through C) Both the Petitioners and the Respondent have sought to appropriate these rights by complying with state and federal statutes. Respondent has taken possession and has continued in possession of the claims extracting substantial ore from them. Respondent has not been injured by any act of Petitioners and Petitioners have received no

benefit whatsoever from the claims. There was no evidence before the trial court that Respondent was prevented from selling or encumbering its interest due to the pendency of Petitioners' competing mining claim.

Throughout these proceedings and specifically in its brief in opposition, Respondent has used the tactic of name calling and character assassination to paint the Petitioners with a black hat and itself with a pure white hat. One example of this tactic is the attribution of all the alleged flaws in the Pioneer claims to Petitioners. While Petitioners do not agree that the claimed defects in the Pioneers are fatal to their claims, none of the problems with alleged defects in the Pioneer claims were created by Petitioners. Petitioners presented the Pioneer claims as they found them, warts and all. Nevertheless, Placer tries to use the record of facts regarding the Pioneer claims to paint Centennial as a malicious actor. In fact, aside from the alleged defects in the Pioneer claims, the state of the record at the time this case commenced includes numerous defects in Placer's title, which the trial court should have construed in favor of Petitioners on Placer's motion for summary judgment.

Examples of these defects in Placer's title are: (1) The Top claims filed in 1974 were never assigned a BLM number (the BLM numbers were apparently assigned to the amended Top Claims which were filed in 1979) (App. pgs. 183-188; R. Vol. XI, exhibit 9)); (2) Placer's own amended location certificates Top 1A through 4A have been declared invalid by the trial court (B-26); (3) Location certificates for the Top claims describe a completely different range from the range where the Bald Mountain mine is located. Placer's location certificates show them to be located in Range 53 E. whereas the Bald Mountain Mine is located in Range 57 E., more than twenty miles away. (App. pgs. 178-181; R. Vol. XI, exhibit 8); (4) Claims by Placer that work commenced on the mine prior to October 1985 when reports to shareholders show expenditures for work did not occur until after October 1, 1985 (R. Vol. II, pg. 289); and (5) There is no public record of the Top claims being transferred to Placer until after the litigation commenced. Placer relies on floating deeds which do not specifically identify any location. The deed of conveyance of the Top claims to Placer dated January 26, 1976 describes the property conveyed as follows: "All other mineral lands or deposits of minerals or interests therein which intervenes between the individual mining claims described in Exhibit A or are situated within five miles of the exterior boundaries of Polly 12." The Top claims are not specifically mentioned in the deed. (App. pgs. 202-205; R. Vol. II, pg. 473).

Each of these defects in Placer's title go to the question of the validity of Placer's title which was decided by Summary Judgment, and

had nothing to do with the Pioneer claims. To draw attention away from these facts, Placer has attempted to attribute alleged defects in the Pioneer claims to Petitioners.

There was no evidence before the trial court at the time it decided the question of liability in the second motion for summary judgment showing Petitioners acted with negligent, careless, malicious, or oppressive conduct. The evidence before the trial court showed that Petitioners had a legitimate dispute as to the ownership of the claim. The facts showed that Petitioners acquired the claim to Bald Mountain Mine and there was substantiated evidence that the acquired claim was valid. In fact, the title opinion of Placer's own counsel, which Placer furnished in its memorandum in support of its first motion for summary judgment, does not show the intervening claims that the trial court ultimately found defeated the Petitioners' title. The validity of Petitioners' dispute is also pointed out by the fact that the trial court itself denied Placer's first motion for summary judgment. In addition, Petitioners' obtained the advice of professor Schmid, a minerals law expert from the University of Utah Law School who stated that its claim had merit. There is no evidence, except self serving statements of Placer, that Petitioners acted in any way contrary to societal values of justice and propriety.

The minerals in question belong to the United States. The U.S. Congress and the Nevada legislature have prescribed the method by which these minerals can be appropriated. Petitioners had as much right to seek appropriation of these minerals as Placer did. Petitioners had numbers assigned to its claims by the Bureau of Land Management and gave notice just as Placer did. What is involved here is a legitimate difference of opinion as to title, which is common in the mining industry where competing unpatented claims are located on public domain.

Placer has used outrageous tactics which make conclusory allegations of misconduct by Petitioners as a smoke screen to direct attention away from the fact that its claim to a multimillion dollar mine is in doubt. The trial judge bought Placer's strategy to place a "black hat" on Petitioners resulting in an excessive punitive damage award. No trial was held on the question of liability. No jury heard the facts on damages, nor did the Nevada Supreme Court make a record of its review.

II. Attorney's Fees Were Awarded Contrary To Nevada Law

A. An Attorney's Fees Award is Improper Because They Are Not Provided For In A Rule, Statute or Contract.

In *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132, 138 n.4 (1987), the Nevada Supreme Court stated that it "has consistently held that absent a rule, statute or contract which authorized an award of attorney's fees, such fees may not be allowed." *Ace Truck*, 746 P.2d at 138 n.4 (citing *Lubritz v. Circus Circus Hotels, Inc.*, 101 Nev. 109, 693 P.2d 1261 (1985)). Because there was no contractual basis for the award of attorney's fees and it did not fall within any other rule or statute which would justify an award of attorney's fees, the court concluded that the award for attorney fees should be stricken from the judgment. *Ace Truck*, 746 P.2d at 138 (citing N.R.S. 18.010).

B. If Attorney's Fees Are Allowed, They Should Be Considered Punitive Damages

Even if this Court determines that attorney's fees should be awarded, they should be characterized as punitive damages not compensatory damages. The trial court did not award the attorney's fees under N.R.S. 18.010(2). The trial court said "of course, the attorney's fees here were not awarded under this statute, they are awarded as damages." B-35 (emphasis added). According to its reasoning on page B-35, the trial court could have used its discretion to award the attorney's fees under N.R.S. 18.010(2), but it decided instead to make the award under the rationale of *Summa Corporation v. Greenspun*, 98 Nev. 528, 655 P.2d 513 (1982). *Summa* involves a trust deed on Greenspun's land, which Summa Corp. refused to release even though the note it secured had been paid. The trial court in *Summa* made its determination based on extensive evidence of malice and bad faith by Howard Hughes, the sole shareholder of *Summa*, and certain of its directors. Based on this evidence the court found that attorney's fees and costs should be awarded to Greenspun. Both N.R.S. 18.010(2) and *Summa* constitute exceptions to the Nevada rule, which is the same as the American rule, which prohibits an award of attorney's fees to the prevailing party unless specifically provided for by contract or statute or a showing of bad faith.

Fee shifting of this nature constitutes punitive damages. Both the Nevada statute and the *Summa* case require a showing of bad faith, which creates an exception to the American rule and grants an award of attorney's fees to the prevailing party. Therefore, such an award is an exception to the general rule against fee shifting and constitutes punitive damages rather than compensatory damages as stated by the trial court. This Court has indicated that "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). This Court has further stated that "[t]he award of attorney's fees for bad faith serves the same purpose as a remedial fine imposed

for civil contempt," because "it vindicates the District Court's authority over a recalcitrant litigant." *Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S. Ct. 2123, 2137 (1991) (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)). In this respect, the fact "[t]hat the award has a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." *Id.* at 2137 (quoting *Hutto*, 437 U.S. at 691 n.17). Therefore, the attorney's fee award is punitive in nature.

III. If the Standards for Reviewing Punitive Damage Awards Outlined in *Ace Truck* do not Require Consideration of All Five Factors Listed, Then the *Ace Truck* Standards Violate the Due Process Standards Set Forth in *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991).

The Nevada Supreme Court in *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987) and again in *Ainsworth v. Combined Insurance Company of America*, 104 Nev. 587, 763 P.2d 673 (1988) list five factors to be considered when reviewing punitive damage awards. These factors are (1) the financial position of the defendant; (2) the culpability and blameworthiness of the tortfeasor; (3) the vulnerability and injury suffered by the offended party; (4) the offensiveness of the punished conduct when compared to societal norms of justice and propriety; and (5) the means judged necessary to deter future misconduct.

While it is unclear whether these factors alone are enough to satisfy the due process standards set forth in *Pacific Mutual*, neither the trial court nor the Nevada Supreme Court considered or applied each of these factors. The trial court and the Nevada Supreme Court did not consider the financial position of the defendant, nor did they consider the vulnerability and injury suffered by the offended party. Two of the five factors were not considered by the Nevada courts. This allows the Nevada courts to selectively choose which factors to consider and which to ignore. All of the factors are interrelated and should be considered when evaluating a punitive damage award.

A. The Nevada Supreme Court's Failure to Require Respondent to Show Evidence of Petitioners' Financial Condition Violated the Due Process Standards of *Pacific Mutual*.

There is no doubt that the trial court had no evidence before it as to the Petitioners' financial condition. The trial court stated: "In any event, the bankruptcy records were not relied upon in reaching the decision and judgment ultimately entered, and are not relied upon in

this amended judgment." *See* B-31. The trial court held that in Nevada "punitive damages may be awarded absent evidence of the wrongdoer's net worth as long as there is no evidence that the award will financially destroy the wrongdoer." B-40. As authority for this conclusion the trial court cites *Hotel Riviera Inc. v. Short*, 80 Nev. 505, 518, 396 P.2d 855, 863 (1964).

The *Hotel Riveria* case is distinguished from this one on its facts. The liability in that case was based on a conspiracy theory. Furthermore, it has been overruled by *Ace Truck* and its progeny which require specific elements be considered to determine the amount of a punitive damage award, including the financial condition of the defendant.

These more recent Nevada Supreme court decisions clearly indicate that evidence of defendants' financial condition is a factor that must be considered in determining the amount of a punitive damages award. *Ace Truck*, 746 P.2d at 132. In *Ace Truck* the court examined the financial position of the two defendants to find that the punitive damage award was excessive.

The trial court in the present case held that no evidence of Petitioners' financial condition was in evidence. When no such evidence exists no punitive award can be made because no determination of the effect of such award on the defendant is possible. *See Ace Truck*, 746 P.2d at 132.

In *Ainsworth v. Combined Insurance Company of America*, 104 Nev. 587, 763 P.2d 673 (1988), a decision subsequent to the *Ace Truck* case, the Nevada Supreme court clearly indicated "that the financial position of the defendant is still relevant to the determination of the amount of the punitive damages award." The *Ainsworth* court further stated: "The wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior." *Id*; *see Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 510 P.2d 876 (1973).

This question was recently addressed by the California Supreme Court *Adams v. Murakami*, No. S003530, slip op. (Cal. filed Aug. 15 1991). The California Supreme Court noted that the key question is whether the amount of damages exceeds the level necessary to properly punish and deter. The question cannot be answered in the abstract. A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition.

The most important question is whether the amount of a punitive damages award will have the desired effect--without being excessive. Even if an award is entirely reasonable in light of the other factors in *Ace Truck*, the award can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone. The determination of whether an award is excessive is admittedly more art than science. When provided with evidence of a defendant's financial condition, however, the reviewing court can at least reach a reasonably informed decision. Without such evidence, it can only speculate as to whether the award is appropriate or excessive.

The Respondent makes no attempt to justify the trial court's discarding the Petitioners' financial condition from the analysis, they simply state the bare conclusion that trial court need only consider conclusory assertions as to Petitioners' actions. Any analysis of punitive damages that does not take into account the financial position of the defendant, will not enable a reviewing court to make an informed determination of whether an award is excessive, and sound public policy should preclude awards based on speculation. Compensatory damages cannot be based on speculation, and the rule should not be any different for punitive damages.

In upholding the award at issue in *Pacific Mutual Life Insurance Co. v. Haslip*, ____ U.S ____, 111 S.Ct. 1032 (1991), this Court noted the state's "post-trial procedures for scrutinizing punitive damages." The factors deemed appropriate for the trial court to consider included "the impact upon the parties." Obviously, this factor would encompass consideration of the defendant's financial condition.

The California Supreme court in analyzing *Pacific Mutual* placed great importance on the fact that the Supreme Court emphasized the "detailed substantive standards" the Alabama Supreme Court used in evaluating punitive awards on appeal. The California court noted that the Alabama court had made clear that the defendant's financial condition is "a consideration essential to a post-judgment critique of a punitive damages award."

The California Supreme Court went on to point out, if the plaintiff does not introduce evidence of the defendant's finances, the only alternative source of information is the defendant, and it is inherently prejudicial to require him to submit such evidence. It places him in the position of bidding against himself by suggesting to the jury that the he is admitting punitive damages should be assessed. Therefore, the California Supreme court held that burden of producing such evidence is properly placed upon the plaintiff.

Evidence of Petitioners' financial condition in the present case is essential to determine the amount of the punitive damages award when such evidence is absent the award must be reversed or remanded.

B. The Nevada Supreme Court Violated the Standards Set Forth in *Pacific Mutual* by Not Requiring the Trial Court to Consider the Substantial Wealth of the Plaintiff [Respondent].

Evidence of the plaintiff's financial condition was introduced but was ignored by the trial and appellate courts. The evidence shows that the plaintiff was not vulnerable to the actions of defendant, whatever they may have been, where the maximum actual damages were $12,000. Plaintiff is an extremely wealthy, multinational corporation. Placer's 10K report for calendar year 1988 filed with the U.S. Securities Exchange Commission, (R. Vol. II, pg 276), shows that Placer's Financial Condition as of December 31, 1988 was as follows: Gross Assets $2,611,700,000 Net Assets $1,896,500,000 Gross Earnings $788,100,000, Net Earnings $262,400,000, Net Worth $700,000,000. Placer's claim on pages 13 and 14 of its brief in opposition that Placer was vulnerable is without merit. The effect of the punitive damage award on Placer is to reward a wealthy plaintiff that was not vulnerable to the actions of Petitioner. The financial condition of Placer should have been considered under the five factor test of *Ace Truck*, but was not. The Nevada Supreme Court endorsed this action by affirming the trial court's decision without comment. This action violates the standards of due process set forth in *Pacific Mutual*.

IV. The Trial Court Should Have Applied N.R.S. Section 42.05 To Limit Punitive Damages.

Respondent claims that N.R.S. 42.005 does not apply because the effective date of the amendment imposing limitations on punitive damage awards was May 30, 1989. The original judgment was entered on June 5, 1989, after the effective date of the amendment. *See* appendix D-27. The Respondent claims that the amendment did not apply on April 17, 1989, the date the hearing was held. We disagree. Not only was the judgment entered on June 5, 1989 after the date of the amendment, but the original decision was reconsidered and substantially amended after the effective date of the amendment on October 16, 1989 and again on December 22, 1989. *See* appendix B and C. The nature of these amendments dealt specifically with the punitive damages portion of the original decision. Therefore, the "trier of fact's decision" was made after the effective date of the act and the statute was applicable and should have been considered.

V. The Trial Court's Refusal to Continue the Trial on Damages Violated Petitioners' Due Process Rights.

Petitioners made timely motions for a continuance and to strike the damages trial setting because they could not obtain new counsel. This motion was supported by an affidavit and copies of letters to counsel. (R. Vol II 374-377) For Petitioners to obtain counsel it was necessary for prospective counsel to review transcripts of prior proceedings. Rule 11[1] of the Nevada Rules of Civil Procedure requires counsel to be familiar with all prior proceedings.

Despite requests and advance payment for transcripts from the trial court, the transcripts were not completed before trial due to the press of other court business. The trial was held April 17, 1989 and the transcript of the hearing on the second motion for summary judgment was not completed until June 5, 1989.

VI. Respondent Has Not Countered Several Arguments Made In Petitioners' Petition.

Petitioners have made arguments and cited cases in thier petition on pages 9 to 25 that support the following conclusions: (1) Nevada law as applied in this case fails to meet the constitutional standard required by *Pacific Mutual* and, therefore, violates the fourteenth amendment; (2) Nevada law for imposing and reviewing punitive damage awards violates due process; (3) The amount of the punitive damages award in this case was excessive; (4) The suit below must be considered criminal in nature as to the punitive damages award therein, which entitles Centennial to protection under the

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[1]Rule 11 states in part:

> The signature of an attorney or party constitutes a certificate by that attorney to or party that he or she has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief, formed after ***reasonable inquiry*** under the circumstances obtaining at the time of signature, that it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee. Nev. R. Civ. Pro. Rule 11 (emphasis added).

fourteenth amendment. The punitive damages imposed against Petitioners fall within the controlling test established by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and the Nevada law for imposing punitive damages meet the *Kennedy* test. The fact that punitive damages are sought by private plaintiff's rather than the government does not prevent the penalty from being deemed criminal in nature; and (5) The constitutional defects in the award of punitive damages against Petitioners in this case were not cured by judicial review or the potential for a remittitur.

Nothing in the Respondent's brief negates any of these arguments.

CONCLUSION

The Punitive damages awarded in this case are excessive and were awarded without proper consideration of Nevada State statutes and case law, and without the full panoply of the due process protections required by the fourteenth amendment. *See Pacific Mutual*, 111 S. Ct. at 1032. The determination by the Nevada trial court and the Nevada Supreme Court should be reversed and remanded because: (1) The punitive damage award in this case is clearly excessive. The ratio of punitive damages to compensatory damages is 83 to 1 if attorney's fees are denied. If attorney's fees are awarded and properly characterized as punitive damages, the ratio is 98 to 1; (2) The combination of a summary judgment determination of liability and a failure by the trial and appellate courts to consider applicable statutory and case law standards violates due process and requires that this case be reversed and remanded for a determination consistent with *Pacific Mutual*; and (3) If the Nevada Supreme Court's interpretation of *Ace Truck* is correct, and less than all five of the factors listed may be considered in reviewing punitive damages cases, the *Ace Truck* analysis violates the due process clause by failing to require consideration of the factors listed in *Pacific Mutual.*

Dated September 12, 1991.

Respectfully submitted,

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